

BEFORE THE PHYSICAL THERAPY LICENSURE BOARD

OF THE STATE OF IDAHO

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OCCUPATIONAL LICENSES

In the Matter of the License of:)
)
JAMES ZANE PARMER,)
License No. PT-940)
Respondent.)
)
_____)

Case No. PHT-2007-1

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**

Pending before the Board’s designated Hearing Officer is the State’s Motion for Summary Disposition. Respondent has had an opportunity to respond. Neither party requested oral argument, and the Hearing Officer finds, pursuant to IDAPA 04.11.01.260.03 and 04.11.01.565, that oral argument would not aid the disposition of the matter and is therefore not necessary in order to proceed. The matter is therefore ripe for review. Based upon the State’s motion and the record herein, the Hearing Officer finds that summary disposition in favor of the State should be granted.

**I.
BACKGROUND**

On April 26, 2007, the State filed a Complaint against Respondent James Zane Parmer alleging that Respondent had been convicted of a felony in violation of the laws governing the practice of physical therapy. The State sought disciplinary action against Respondent for violations of Idaho Code §§ 54-2219(4), (7), and (10). On May 14, 2007, Respondent filed an answer to the allegations. Respondent admitted that he had been

convicted of a felony and was currently incarcerated. He did not deny the other allegations in the Complaint. However, Respondent asserted that he was innocent of the criminal charges brought against him. Respondent also stated that the criminal matter was currently on appeal.

On October 1, 2007, the Hearing Officer issued a prehearing Order setting forth deadlines for discovery and dispositive motions, and requested available dates for a hearing should dispositive motions fail to resolve the matter. In response, Respondent indicated that he could participate in the proceedings via written responses, and in his response to the prehearing Order, indicated that he did not renew his license in June 2007.

On October 11, 2007, the State filed a Motion for Summary Disposition. Respondent did not file a responsive pleading or affidavit.

II. FINDINGS OF FACT

The Hearing Officer finds that the following facts are undisputed in this matter. On July 25, 1995, Respondent was licensed as a physical therapist under License No. PT-940. On or about February 4, 2004, Respondent voluntarily entered into a Stipulation with the Idaho State Board of Medicine, then the governing agency responsible for issuing licenses to physical therapists, whereby Respondent agreed not to treat any female patients without either a chaperone present, or in a group setting. The Stipulation was effective for five years. Mem. in Support, Ex. A.

On October 18, 2006, a Judgment of Conviction was entered against Respondent for Lewd and Lascivious Conduct with a minor under 16, a felony, in Ada County Case No. H0600061. Compl., Ex. A. The victim in Case No. H0600061 was Respondent's

patient, Katelyn R. According to the certified copy of the Judgment of Conviction, Respondent plead “not guilty” to the charges, and a trial was held on August 21, 2006. The jury returned a verdict of “guilty,” finding Respondent’s conduct violated Idaho Code § 18-1508, lewd conduct with a minor under sixteen. The court sentenced Respondent to a term of incarceration of twenty (20) years, with a minimum period of confinement of seven (7) years. Respondent maintains his innocence of the criminal charges, and stated that he has appealed the judgment of conviction.¹

According to the Affidavit of Katelyn R., Respondent treated her as a patient when she was fourteen years old. She contends that she was alone in the treatment room with Respondent, with the door ajar. While aides periodically came in and out of the room, K.R. affirmed no chaperone was present. The criminal charges were brought based upon K.R.’s allegations. Although Respondent maintains his innocence of the criminal charges, Respondent did not refute these facts.

In his submissions, Respondent has requested that the administrative proceedings be delayed until the conclusion of the criminal appeal process. Ans. May 14, 2007. He also indicated that he did not renew his license in June 2007.

III. CONCLUSIONS OF LAW

A. Standard for Summary Disposition.

The Board has adopted the procedures of the Bureau of Occupational Licenses for disciplinary proceedings, which in turn requires compliance with the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code, and the Rules of

¹ Although the State submitted the affidavit of Katelyn R., the Court finds that there is a disputed issue of fact concerning Respondent’s alleged innocence and denial of the allegations of lewd conduct made by Katelyn R. However, this fact is not material to the proceedings, as will be explained.

Administrative Procedure of the Attorney General, IDAPA 04.11.01. IDAPA 24.13.01.275.01; IDAPA 24.20.01.020. Idaho Code § 67-5241(1)(b) permits “any part of the evidence in a contested case to be received in written form if doing so will expedite the case without substantially prejudicing the interests of any party.” While motions for summary disposition are not specifically mentioned by name, the Rules of Administrative Procedure of the Attorney General allow the filing of motions requesting agency action, either with or without a hearing or oral argument, and permit a “paper hearing” when the issue is the application of law to uncontested facts. IDAPA 04.11.01.260; IDAPA 04.11.01.565; *Idaho Admin. Proc. Act With Comments and Idaho Attorney General’s Model Rules of Practice and Procedure* (1993), Cmt. 2 at 25-26. Substantive relief by motion is allowed. IDAPA 04.11.01.565 (stating that motions requesting substantive relief may be filed).

The Hearing Officer is permitted to take evidence to assist the parties’ development of the record, and that evidence should not be excluded to frustrate that development. IDAPA 04.11.01.600. The Hearing Officer is not bound by the Idaho Rules of Evidence, and may admit evidence “if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.” IDAPA 04.11.01.600.

By analogy to the Idaho Rules of Civil Procedure, summary disposition may be granted “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Idaho R. Civ. P. 56(c). The party moving for summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994).

The record is to be construed in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). If the evidence reveals no disputed issues of material fact, what remains is a question of law. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 887 P.2d 29 (1994); *Idaho Admin. Proc. Act With Comments and Idaho Attorney General's Model Rules of Practice and Procedure* (1993), Cmt. 2 at 25-26 (explaining the presiding officer is permitted to hold a paper hearing when doing so will not prejudice the rights of either party, such as when the issue is the application of law to uncontested facts).

B. Grounds for Disciplinary Action Exist as a Matter of Law.

In its motion, the State requests findings as a matter of law that grounds exist for discipline under Idaho Code §§ 54-2219(7) (conviction of a felony), 54-2219(4) (violation of a prior order setting the standard of care), and 54-2219(10) (prohibiting acts of sexual contact with patients).

1. Grounds Exist Under Idaho Code § 54-2219(7).

Pursuant to Idaho Code § 54-2219(7), a conviction of a felony or of any crime having a bearing on the practice of physical therapy constitutes grounds for disciplinary action. A copy, certified by the clerk of the court, of a record of conviction is “conclusive evidence of such conviction.” Idaho Code § 54-2219(7).

The State submitted a certified copy of the judgment of conviction against Respondent in Ada County Case No. H0600061 for lewd and lascivious conduct with a minor under age sixteen, a felony, in violation of Idaho Code § 18-1508. A jury rendered a verdict against Respondent after a trial, and Respondent does not deny that he was

convicted of the charges. Respondent also did not deny that the allegations of K.R., a patient, were the basis of the criminal charges.²

Idaho Code § 54-2219(7) permits disciplinary action upon proof of a judgment of conviction of a felony, regardless of whether the respondent admits or denies the actual underlying charges. The certified copy of the judgment of conviction against Respondent for a felony is conclusive proof that a violation of Section 54-2219(7) occurred. No further evidence is necessary to find that grounds exist for discipline under Idaho Code § 54-2219(7).

2. Grounds Exist Under Idaho Code § 54-2219(4).

The Hearing Officer also received evidence of the Stipulation and Order entered by the Board of Medicine on or about February 4, 2004. That stipulation required Respondent to treat female patients with a chaperone present or in a group setting with other persons present. According to K.R., a female patient, Respondent treated her without a chaperone present and in a separate room, although the door was ajar. Respondent did not deny these allegations. The State argues that the stipulation set the standard of care for Respondent, and that the violation of the stipulation constitutes grounds for discipline under Idaho Code § 54-2219(4).

The Hearing Officer finds that the written testimony of K.R. that she was alone for periods of time in a room with Respondent, and without a chaperone present, constitutes undisputed facts of a violation of the terms of the Stipulation and Order. The Order established the appropriate standard of care for Respondent to follow, in accordance with Idaho Code § 54-2219(4). That section provides that conduct

² Respondent does, however, deny that the allegations are true, and maintains that he is innocent of the criminal charges of lewd conduct with a minor.

constituting the performance of substandard care due to an intentional, negligent, or reckless act constitutes grounds for discipline. The failure to adhere to the Board's order constituted the performance of substandard care due to an intentional act in violation of the Board's prior order. The Order specified that a breach of the order constituted grounds for disciplinary action. Order at 4, ¶ VIII, Mem. in Support Ex. A.

Accordingly, the Hearing Officer finds that grounds exist for discipline as a matter of law under Idaho Code § 54-2219(4).

3. Grounds Exist Under Idaho Code § 54-2219(10).

The State did not submit argument as to why it believed grounds exist, as a matter of law, for a violation of Idaho Code § 54-2219(10). In the Complaint, the State asserted that the conduct underlying the felony conviction involved Respondent committing an act of sexual conduct, and upon that allegation, asserts that a finding as a matter of law is appropriate. Respondent, however, maintains that he is innocent of the criminal charges and has appealed his judgment of conviction.

Idaho Code § 54-2219(10) states that “[c]ommitting any act of sexual contact, misconduct, exploitation or intercourse with a patient or former patient” constitutes grounds for disciplinary action. Idaho Code § 54-2219(10). Respondent was found guilty after a trial by jury of a violation of Idaho Code § 18-1508. That section states:

[a]ny person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-genital contact, whether between persons of the same or opposite sex, . . . when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, . . . shall be guilty of a felony.

Res judicata, and the specific principle of issue preclusion (formerly termed “collateral estoppel”), applies in this case and permits a finding as a matter of law that grounds for discipline exist. The doctrine of issue preclusion prevents relitigation of issues that were litigated and decided in a previous case. *Western Indus. & Environ. Servs., Inc. v. Kaldveer Assoc., Inc.*, 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994). Issue preclusion bars the relitigation of an issue determined in a felony criminal proceeding in which the party against whom the issue was decided had a full and fair opportunity to litigate. *Anderson v. City of Pocatello*, 112 Idaho 176, 179, 731 P.2d 171, 184 (1987) (holding that felony criminal proceedings act as collateral estoppel (issue preclusion) in a later civil proceeding).

To establish issue preclusion, the following four factors must be met:

- (1) did the party against whom the earlier decision is asserted have a full and fair opportunity to litigate the issue in the earlier case;
- (2) was the issue decided in the prior litigation identical with the one presented in the action in question;
- (3) was the issue actually decided in the prior litigation; and
- (4) was there a final judgment on the merits.

Anderson, 731 P.2d at 183-84. The Hearing Officer finds that factors one and four are met. Respondent was charged with a felony, and was represented by counsel. After a trial, the jury returned a guilty verdict. As would be expected, the motive for resisting the action was strong, since the maximum penalty was life imprisonment. Clearly, Respondent was afforded a full and fair opportunity to litigate the issues in the criminal case, and a final judgment of conviction was entered.

As to factor number two and three, this requires examination of the criminal charge and the disciplinary violation. The jury found Respondent guilty of Idaho Code § 18-1508, which sets forth a sexually explicit definition of what constitutes a lewd or

lascivious act. All of the included acts involve contact by the Respondent with the genital or anal area of the victim for the purpose of sexual gratification. Idaho Code § 54-2219(10) prohibits “sexual contact” with a patient. Although not explicitly defined, the Hearing Officer finds that “sexual contact” includes the graphic definitions comprising “lewd or lascivious acts.” The issue decided by the jury in the criminal action is therefore identical to the issue in this case, and it was actually decided by the jury resulting in a verdict of “guilty.” It is of no moment that Respondent denies the charges, because by operation of law the elements of issue preclusion apply to prevent relitigation of the issue of sexual contact decided by the jury in the criminal matter so long as all four factors permitting application of issue preclusion are established.

Idaho Code § 54-2219(10) requires an additional element, that the sexual contact occur with a patient. Katelyn R. stated in her affidavit that she was Respondent’s patient at the time the alleged lewd conduct occurred and for which Respondent was convicted. In all of Respondent’s submissions throughout these proceedings, he did not deny that Katelyn R. was his patient, or that the conviction was entered based upon her allegations. Accordingly, the Hearing Officer finds that there is no disputed issue of material fact concerning the fact Katelyn R. was Respondent’s patient at the time of the alleged sexual contact.

Accordingly, the Hearing Officer finds as a matter of law that grounds for disciplinary action exist under Idaho Code § 54-2219(10).

C. The Board May Take Action.

Respondent has requested a delay of the action until the criminal appeal process has concluded. He expects his conviction to be “overturned.” However, the Board, “like

any administrative agency, is ill-equipped to consider whether a criminal conviction is valid. Thus, the Board must be allowed to rely upon the conclusive effect of a conviction.” *Brown v. Idaho State Board of Pharmacy*, 113 Idaho 547, 549-50, 746 P.2d 1006, 1008-09 (Ct. App. 1987). In *Brown*, the Court noted that an agency could rely upon a criminal conviction even though the respondent may be appealing the entry of judgment. *Brown*, 746 P.2d at 1009 (citing *Thomas v. Dept. of Motor Vehicles*, 3 Cal.3d 335, 90 Cal. Rptr. 586, 475 P.2d 858 (1970)).

While Respondent may request a stay of the administrative proceedings during the criminal appeal process, there is no right to a continuance of an administrative proceeding pending the outcome of criminal proceedings. *Brown*, 746 P.2d at 1009 (noting that a stay is procedurally appropriate, but not requiring such action); *Malave v. Dept. of Health, Board of Medicine*, 881 So. 2d 682, 684 (Fla. Ct. App. 2004) (“There is no absolute right to a continuance of an administrative proceeding pending the outcome of parallel criminal proceedings”). The Hearing Officer has discretion to stay the proceedings. IDAPA 04.11.01.561.

In the instant matter, the Hearing Officer finds that discretion should be exercised in favor of proceeding with entry of an order. A stay of these proceedings could be prolonged indefinitely, as Respondent has the ability to continue his appeals. It would be far better to revisit the issue should Respondent present future evidence to the Board that his conviction was reversed. At that time, the Board may consider any mitigating or extenuating circumstances resulting in the reversal of Respondent’s felony conviction.

**IV.
CONCLUSION**

The Hearing Officer finds, based upon the foregoing, that there are no disputed issues of material fact precluding entry of an order for disciplinary action on the grounds of a violation of Idaho Code §§ 54-2219(4), (7), and (10) as alleged in the Complaint.

The Hearing Officer therefore recommends entry of the following order.

RECOMMENDED ORDER

Based upon the foregoing, the Hearing Officer hereby recommends that the Board adopt the following Order:

1. That Respondent's license and any right to renew be revoked pursuant to Idaho Code § 54-2221(4) and (5);
2. That a reasonable fine be considered pursuant to Idaho Code § 54-2221(6) and IDAPA 24.03.01.275.02; and
3. That Respondent be assessed costs and attorney fees for the investigation and administrative action pursuant to Idaho Code § 54-2221(8).

Submitted this 2 day of January, 2008.


Kirsten Wallace
Hearing Officer

NOTICE OF PROCEDURAL RIGHTS

The Hearing Officer has issued a Recommended Order pursuant to Idaho Code 67-5243(a). It will not become final without action of the agency head (or the agency head's designee) pursuant to Idaho Code § 67-5244.

Any party may file a petition for reconsideration of this recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of this Order. The hearing officer issuing this recommended order will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code § 67-5243(3).

Within twenty-one (21) days after: (a) the service date of this recommended order; (b) the service date of a denial of a petition for reconsideration from this recommended order; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may file in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee of the agency head) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

ORDER

The Board hereby accepts the Recommended Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer. It is hereby **ORDERED** and this does Order that:

1. Respondent's license and any right to renew is **REVOKED** pursuant to Idaho Code § 54-2221(4) and (5);
2. A fine in the amount of \$_____ is imposed pursuant to Idaho Code § 54-2221(6); and
3. Respondent shall be assessed costs of investigation in the amount of \$_____ and attorney fees in the amount of \$_____ for the costs of investigation and administrative action pursuant to Idaho Code § 54-2221(8).

DATED this _____ day of _____, 2008.

IDAHO PHYSICAL THERAPY LICENSURE BOARD

Alan Crothers, P.T.
Chair

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2008, I caused to be served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER by the following method to:

Karl T. Klein
Deputy Attorney General
Civil Litigation Division
P.O. Box 83720
Boise, ID 83720-0010

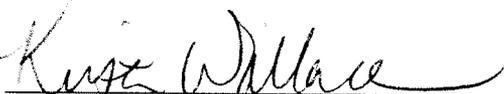
U.S. Mail
 Hand Delivery
 Certified Mail, Return Receipt Requested
 Overnight Mail
 Facsimile: _____
 email: _____

James Zane Parmer #83231
Idaho State Correctional Inst.
Unit 10
P.O. Box 14
Boise, ID 83707

U.S. Mail
 Hand Delivery
 Certified Mail, Return Receipt Requested
 Overnight Mail
 Facsimile: _____
 email: _____

I further certify that the **original** document was filed with the Board on the same date by depositing the same in the U.S. Mail, postage prepaid, and addressed to:

Idaho State Physical Therapy Licensure Board
109 Main St.
Owyhee Plaza Suite 220
Boise, ID 83702-5642.



Kirsten Wallace
Hearing Officer